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# Chess match nets $12.25M in construction defect suit

By: Brandon Gee January 16, 2014

One Charles high-rise in downtown Boston. (Photo by John Mecklenburg)

Thomas O. Moriarty had a problem. The construction defect case he was handling, filed against developers on behalf of a condominium association, was nearing trial after six years of litigation.

The Braintree lawyer believed he could prove damages of $40 million if the case were tried. But there was an acceptable, if not preferable, fix to the problems at the condominium building in question that would cost just $11 million. Settlement, it seemed, was a no-brainer.

"Ninety-five percent, if not more, either get settled before litigation or as soon as we file suit," Henry A. Goodman said of construction defect lawsuits filed by condo boards. Goodman's Dedham firm — Goodman, Shapiro & Lombardi — represents more than 800 condominium associations in Massachusetts and Rhode Island.

"Usually, you either do or do not have evidence of something wrong. It's glaring, like water through the roof. It's there; you see it," he says.

But Moriarty's case was not like most. For one, his client was the association board of directors for One Charles, a 550,000-square-foot, 231-unit luxury high-rise near Boston Common created by one of the city's most prominent developers, Millennium Partners.

Further, the building's alleged issues were not as glaring as "water through the roof." The condo association claimed that the building's HVAC system was defective and resulted in less visible problems such as high humidity, the migration of smoke and cooking odors throughout the building, and "negative pressurization," a condition in which the amount of air exhausted from a building exceeds the supply of treated replacement air, causing untreated outside air to rush into the building whenever doors and windows are opened.

The defendants in the case were Millennium affiliate MDA Park LLC and a host of contractors and subcontractors, including architectural and engineering firms. As the project's "declarant," MDA Park faced the most risk and liability in the suit.

Moriarty believed the reason he was having trouble getting the parties to settle was because the HVAC design engineer, Cosentini Associates, was relying heavily on the well-heeled developer not only to coordinate and lead the defense, but also to cover any potential damages that would result from the case.

Moriarty put himself in the shoes of MDA Park and came to the conclusion that Cosentini's assumption was wrong; the developer would assert claims against its contractors and subcontractors to satisfy any potential judgment against it. But with both parties believing, correctly or incorrectly, that their exposure was limited, they had little motivation to settle.

"It was a very interesting process because we had a number of attempts at settlement," said MDA Park's lawyer, Richard J. Shea of Hamel, Marcin, Dunn, Reardon & Shea in Boston. "It was the classic case where the defendants couldn't fairly allocate fault and responsibility among themselves. When it came down to a design-based claim, we were relying on the people MDA retained to step up and take responsibility. We didn't consider ourselves to be the legally responsible defendant in the case."

**The move**

To clear the logjam, Moriarty decided to take a chance.

"If we went to trial, even if we got a significant judgment, MDA would be expected to pass that through to the engineers," the Marcus, Errico, Emmer & Brooks lawyer said.

"MDA wasn't going to give us a lot of money. [We decided] we've got to shake it up somehow, and the best way to shake it up would be to get MDA out of the case so that the design engineers wouldn't even have the expectation that they were going to cover it," he said.

So Moriarty took what he considered "a discount" from MDA to flush the defendant from the suit. With MDA out of the picture, the HVAC designer would have to accept the fact that, in order to get out as well, it had to return to the settlement table and think more seriously about its liability, he said.

The move also allowed Moriarty to kill two birds with one stone.

"MDA Park were the champions, and their lead defense counsel was highly skilled and doing an excellent job of defending the case," Moriarty said. "We felt if we could take their principal lawyers out of the game shortly before trial, that was going to be strategically advantageous to us."

The decision paid off, and Cosentini also eventually settled. The total value of the settlements with all defendants was $12.25 million, but confidentiality provisions prevent Moriarty from revealing who paid what. (Cosentini's lawyers from Donovan Hatem in Boston did not respond to an interview request.)

The tack Moriarty took in the case is not lost on opponent Shea.

"Ordinarily, these cases are all or nothing. Everybody globally resolves or they don't. From that perspective, [Moriarty] strategically made a good decision to let MDA out along with the mechanical contractors," Shea said.

With sizeable settlements in the condo construction arena generally running in the $1 million to $2 million range, the amount of Moriarty's award is noteworthy, Goodman said, adding that dismissing a defendant from such a case can be a risky move, prompting remaining defendants to assert an empty-chair defense.

But Donna M. Turley, a Boston litigator who represents condo trustees and unit owners, said it must have been pretty clear that the HVAC engineer was responsible for the problems at issue.

"Absolutely, it's usually the declarant who has the most risk and liability," Turley said. "This is a very curious case that the declarant would be removed from this. [Liability] must have been heavily weighted toward the subcontractor."

Moriarty is the first to admit that it was "an intimidating step to take," but he does not believe he would have achieved a favorable settlement otherwise.

"It's somewhat daunting to say, 'I'm going to let them out for what I would consider significantly less than what you would expect the developer to pay if there had been a global settlement,'" Moriarty said. "You never know in these cases. You have to make the best decision based on the information you have. But in hindsight, I think it was one of

the two pivotal moves that brought the case to resolution."

If the case holds a practical lesson for other lawyers, Shea said it is if you choose not to engage in a global settlement, you run the risk of increasing your exposure when you go it alone.

"The initial settling defendants got out for a very reasonable sum," he said. "We settled not on the eve of trial, and the remaining defendant was faced with the threat of trial and ended up resolving the case in a fashion markedly different."

**Experts stricken**

Moriarty said the second pivotal development in the case was the evisceration of Cosentini's experts. After the plaintiff settled with MDA Park, the HVAC engineer defendant scrambled to shore up its defense.

"Virtually all of the experts that we were relying upon with the exception of the two we had designated were now taken away from us," Cosentini's lawyer, Eric A. Howard, said at a hearing before Judge Thomas P. Billings in the Business Litigation Session. "We can't even contact them by virtue of the terms of the settlement between the plaintiff and settling defendants."

The hearing concluded with Billings granting the plaintiff's motion to strike supplemental expert disclosures that Cosentini submitted after MDA Park settled and exited the case. Perhaps more damning, though, was what Billings had to say not only about the supplements, but Cosentini's expert disclosures in general.

"It's not a disclosure of the opinions and the bases therefore," Billings said at the Aug. 20 hearing. "You've identified a subject matter but there's nothing about what his opinion would be or what the bases therefore would be."

That commentary loomed large when, a month later and 12 days before the trial was scheduled to begin, Moriarty filed a motion in limine to preclude Cosentini from calling any expert witnesses at trial on the basis that the disclosures were "so incomplete and vague that the Plaintiff could not be expected to prepare a response to the proposed testimony of any of Cosentini's expert witnesses."

At a subsequent mediation, Moriarty said, the opposition didn't make much of an argument to the contrary, and the case settled just before Christmas.

**SIDE BAR: Economic loss doctrine rejected in condo case**

The $12 million-plus settlement figure was not the only reason a suit involving the One Charles Condominium Association was gratifying to plaintiff's lawyer Thomas O. Moriarty.

At the summary judgment stage last July, the case became one of the first to apply the Appeals Court's December 2012 ruling in *Wyman, et al. v. Ayer Properties LLC*.

In *Wyman*, which was won by the Braintree attorney on behalf of another condominium association, the Appeals Court ruled that the economic loss doctrine does not bar a condominium association's negligent construction claim against a developer for defects in common areas. The decision was appealed and is now pending before the Supreme Judicial Court.

In an attempt to force litigants to recover under the provisions of their contracts with one another, the economic loss doctrine bars tort damages stemming from defective products absent a showing of personal injury or damage to other property. The doctrine was problematic for condominium associations trying to sue over construction defects, since associations don't come into being until after a project is finished.

"Condominium associations really own nothing. They never bought anything," said Dedham lawyer Henry A. Goodman, who authored an amicus brief for the pending SJC case on behalf of the Community Associations Institute. "They are given authority over something purchased by others. If something breaks or is wrong, they are left without remedy, in theory. In my opinion, it is a contrived rule that seems to be sort of ridiculous."

In the One Charles case, Business Litigation Session Judge Mitchell H. Kaplan cited the Appeals Court's decision in *Wyman* to deny a defendant's motion for summary judgment.

"I'm glad that the court has recognized what the Appeals Court asserted in the *Wyman* case, which is that you can make a claim of negligence against a developer," Boston litigator Donna M. Turley said. "It's important because how else are condo associations able to assert their losses if there has been some sort of negligence on behalf of the developer? Trustees don't take shape until developer has left the scene."


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